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JPMorgan Chase Bank, N.A., and  
7 Select Portfolio Servicing, Inc.

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 MICHAEL A. WITHERS,  
12 Plaintiff,

13 v.

14 J.P. MORGAN CHASE BANK N.A., a  
National Association; SELECT PORTFOLIO  
15 SERVICING, INC., a Utah Corporation; and  
DOES 1 through 100, inclusive,  
16 Defendants.  
17

Case No. 4:14-cv-00351-KAW

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS PURSUANT  
TO FED. R. CIV. P. 12(B)(6) BY  
DEFENDANT JPMORGAN CHASE  
BANK, N.A. AND SELECT  
PORTFOLIO SERVICING, INC.**

Date: April 3, 2014  
Time: 11:00 a.m.  
Dept.: 4  
Judge: Hon. Kandis A. Westmore

Complaint Filed: December 20, 2013

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Michael A. Withers borrowed \$600,000 in 2005 to acquire property located at 886 44th St., Oakland, CA 94608 (“Property”). Only months later, Plaintiff defaulted on his mortgage. Instead of either making payments or allowing the foreclosure process to proceed—as he agreed to in the Deed of Trust associated with his mortgage—Plaintiff chose to stall foreclosure by filing numerous Voluntary Bankruptcy Petitions. In *less than* one year (leading up to the October 2013 foreclosure on Property), Plaintiff filed for bankruptcy protection *three* times.<sup>1</sup> More telling, each of his Petitions were dismissed because he did not provide documents or schedules supporting his bare Petitions.

Now, Plaintiff brings this action against Defendants JPMorgan Chase Bank, N.A.<sup>2</sup> (“Chase”) and Select Portfolio Servicing, Inc. (“SPS”) for one alleged violation of the newly-enacted California’s Homeowners Bill of Rights, codified at Cal. Civ. Code<sup>3</sup> §§ 2920, *et seq.* (“HBOR”). Specifically, Plaintiff alleges that Defendants improperly “dual-tracked” him by considering him for a foreclosure prevention alternative while simultaneously advancing the foreclosure process. *See* Cal. Civ. Code §2923.6. Plaintiff’s claim fails, however, because: (1) he fails to make any allegations that Chase violated the HBOR; (2) the HBOR does not apply to repeat bankruptcy filers, with a pending bankruptcy; and, (3) assuming *arguendo* Plaintiff qualified as a “borrower” under the HBOR, the HBOR provides only for actual damages for “material” violations of Section 2923.6, which Plaintiff has failed to and cannot plead based upon his history of delinquency and bankruptcy filings specifically timed to disrupt foreclosure (*i.e.*, Plaintiff was not prejudiced by any alleged violation of the HBOR).

Accordingly, Defendants respectfully request that the Court sustain the present Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), without leave to amend.

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<sup>1</sup> This is exclusive of his earlier bankruptcy petitions.

<sup>2</sup> Defendant JP Morgan Chase Bank, N.A. was erroneously sued as “J.P. Morgan Chase Bank N.A.”

<sup>3</sup> All references to “Section” herein refer to the California Civil Code, unless otherwise specified.

## II. STATEMENT OF FACTS

### A. Plaintiff's Mortgage

On or about March 8, 2005, Plaintiff borrowed \$600,000.00 from Long Beach Mortgage Company ("Long Beach") to acquire the Property. (Compl., ¶ 12; Deed of Trust, hereinafter "DOT", Request for Judicial Notice ("RJN"), Ex. 1.) Plaintiff's loan was secured by a Note and DOT, with the DOT recorded March 16, 2005. (DOT, RJN, Ex. 1.) The DOT designated Long Beach as the "Lender," "Beneficiary" and "Trustee." (DOT, RJN, Ex. 1.) On May 18, 2006, Long Beach executed a Substitution of Trustee, naming California Conveyance Company ("CRC") as the new Trustee under the DOT. (Substitution of Trustee, RJN, Ex. 2.)

### B. Plaintiff's Default on His Mortgage

Plaintiff's early default is evidenced by a May 18, 2006 Notice of Default and Election to Sell ("NOD"), recorded by CRC. (5/18/06 NOD, RJN, Ex. 3.) On August 23, 2006, CRC recorded a Notice of Trustee's Sale ("NOTS"). (8/23/06 NOTS, RJN Ex. 4.) The Property, however, was not sold at a Trustee's Sale in 2006.

An NOTS was again recorded August 22, 2008. (8/22/08 NOTS, RJN, Ex. 5) On November 5, 2008, CRC recorded a Notice of Rescission. (11/5/08 Notice of Rescission, RJN, Ex. 6.) On August 11, 2008, another NOD was recorded. (8/11/09 NOD, RJN, Ex. 7). Again, the Property was not sold at a Trustee's Sale in 2008.

### C. The Servicing History on Plaintiff's Mortgage

By 2012, Chase was servicing Plaintiff's loan. (Compl., ¶ 13.) In March 2012, Plaintiff allegedly lost his job. (Compl., ¶ 13.) Shortly thereafter, in 2012, Plaintiff applied for a loan modification with Chase. (Compl., ¶ 13.) However, Plaintiff's only income was "rental income"-- that Chase would not consider for purposes of qualifying for a modification with Chase. (Compl., ¶ 13.) Accordingly, Chase denied Plaintiff's application. (Compl., ¶ 13.)

In "early 2013," SPS assumed servicing obligations of Plaintiff's loan. (Compl., ¶ 12.) Plaintiff alleges that "on or about Summer 2013," he began a new modification application with SPS. (Compl., ¶15.) On October 3, 2013, CRC recorded another NOTS. (10/3/13 NOTS, RJN,

Ex. 8.) Plaintiff alleges, wrongly,<sup>4</sup> that he had a loan modification application pending with SPS when the October 3, 2013 NOTS was recorded. (Compl., ¶ 18.)

Plaintiff admits that, *specifically to stall foreclosure again*, he filed a Bankruptcy Petition on October 23, 2013 (i.e., while his alleged modification application was pending but before a foreclosure sale). (Compl., ¶ 17.) He admits that when he filed this latest Petition, *he did not inform SPS*. (Compl., ¶ 17.) On October 24, 2013, the Property was sold. (Compl., ¶ 17.)

**D. Plaintiff's Bankruptcy Petition History Disqualifies Him From HBOR Protection**

Plaintiff complains that his latest bankruptcy filing came *while* his alleged permanent loan modification application was pending. (Compl., ¶ 17.) But judicially noticeable court records show that Plaintiff filed for Chapter 13 bankruptcy protection on at least three occasions within the year leading up to foreclosure sale, and thus, Plaintiff is disqualified from protection under either bankruptcy stay laws *or* the HBOR.<sup>5</sup>

On May 1, 2012, Plaintiff filed a Voluntary Petition for bankruptcy protection in the U.S. Bankruptcy Court for the Northern District of California, Oakland Division, Case No. 12-43841. (5/1/12 Bankruptcy Petition, RJN, Ex. 9.) On January 15, 2013, Bankruptcy Judge William J. Lafferty, III dismissed Case No. 12-43841, after Plaintiff failed to seek and obtain confirmation of a Chapter 13 Plan. (Order of Dismissal After Case Deficiencies, RJN, Ex. 10.)

On April 11, 2013, Plaintiff filed another Voluntary Petition for bankruptcy protection in Case No. 13-42143. (4/11/13 Bankruptcy Petition, RJN, Ex. 11.) On April 12, 2013, the Bankruptcy Court ordered Plaintiff to submit various documents that were required to be included with his Petition, but were not. (4/12/13 Order to File Required Documents Notice Re Automatic Dismissal, RJN, Ex. 12.) Then, on April 30, 2013, after Plaintiff failed to comply with the

<sup>4</sup> Plaintiff's counsel has been provided with documentation demonstrating that Plaintiff's modification application had been denied, in writing, at least 30 days prior to the recording of the NOTS; and counsel is aware that Plaintiff never appealed that denial with SPS. Thus, if Plaintiff is permitted to amend his Complaint, he must do so to the extent he is able and consistent with Federal Rule of Civil Procedure 11.

<sup>5</sup> 11 U.S.C. § 362(c)(4)(A)(i) (stating that if a bankruptcy case is filed by a debtor after two or more cases of the debtor were pending within the previous year but dismissed, the stay under subsection (a) of the Bankruptcy Code shall not go into effect); Cal. Civ. Code § 2920.5(c)(2) (C) (discussed in further detail below).

1 Bankruptcy Court's Order of April 12, 2013, Bankruptcy Judge Lafferty dismissed Case No. 13-  
2 42143. (4/30/13 Order of Dismissal, RJN, Ex. 13.)

3 On October 23, 2013, the day before the Property was sold at the foreclosure sale,  
4 Plaintiff filed another Voluntary Petition for bankruptcy protection in the U.S. Bankruptcy Court  
5 for the Northern District of California, Oakland Division, Case No. 13-45842. (10/23/2013  
6 Bankruptcy Petition, RJN, Ex. 14.) On November 7, 2013, the Bankruptcy Court ordered  
7 Plaintiff to provide the Bankruptcy Trustee with a copy of his most recent Federal tax returns.  
8 (11/7/13 Order Extending Deadline, RJN, Ex. 15.) On December 4, 2013, after Plaintiff failed to  
9 comply with the Bankruptcy Court's November 7 Order, Bankruptcy Judge M. Elaine Hammond  
10 dismissed Case No. 13-45842. (12/4/13 Order of Dismissal, RJN, Ex. 16.) Plaintiff concedes  
11 that he "didn't give notice of the Bankruptcy filing [to SPS] until after the subject property sold at  
12 foreclosure sale on October 24, 2013." (Compl., ¶ 17.)

### 13 III. ARGUMENT

#### 14 A. Legal Standard

15 Federal Rule of Civil Procedure 12(b)(6) directs dismissal of any complaint that fails to  
16 "state a claim upon which relief can be granted." To survive a motion to dismiss, a complaint  
17 must allege sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v.*  
18 *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). "A pleading that  
19 offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will  
20 not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

21 Although the Court may accept well-pleaded facts in the Complaint as true, bald  
22 assertions and legal conclusions are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at  
23 679. The plausibility standard requires "more than a sheer possibility that a defendant has acted  
24 unlawfully." *Id.* at 678. "A claim has facial plausibility when the plaintiff pleads factual content  
25 that allows the court to draw the reasonable inference that the defendant is liable for the  
26 misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief  
27 will . . . be a context-specific task that requires the reviewing court to draw on its judicial  
28 experience and common sense." *Id.* at 679.

**B. Plaintiff's Sole Cause Of Action For "Dual-Tracking" Should Be Dismissed For Failure To State A Claim Upon Which Relief Can Be Granted**

The HBOR, which became effective January 1, 2013, states that "[i]f a borrower submits a complete application for a first lien loan modification . . . a mortgage servicer . . . shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Cal. Civ. Code § 2923.6(c) (emphasis added). In passing the HBOR, however, California's Legislature intended to "ensure that borrowers who may qualify for a foreclosure alternative are considered for, and have a meaningful opportunity to obtain, available loss mitigation options." Homeowners Bill of Rights, S.B. 900, 2012 Cal. Legis. Serv. Ch. 87, § 1(b) (emphasis added). Thus, *the HBOR does not apply to all home loan borrowers.*

Indeed, limitations to HBOR application are found throughout the HBOR. For example, Section 2923.6(c) states that "[i]f a borrower submits a complete application for a first lien loan modification . . . a mortgage servicer . . . shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Cal. Civ. Code § 2923.6(c) (emphasis added). The HBOR also specifically *excludes* from its application the following individuals from the definition of "borrower":

(B) An individual who has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on *how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.*

(C) An individual who has filed a case under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code and the *bankruptcy* court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.

Cal. Civ. Code § 2920.5(c)(2)(B)-(C) (emphasis added).

As is evident in Section 2920.5(c)(2)(B), the HBOR is not meant to be used as a tool to delay inevitable foreclosure. Indeed, another principle of exclusion for persons intent on delaying proper foreclosure is found in Section 2923.6(g). That section states:

[i]n order to minimize the risk of borrowers submitting multiple applications for first lien modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013 . . . unless there has been a *material* change in the borrower's financial circumstances . . . and that change is *documented by the borrower and submitted to the mortgage servicer*.

Cal. Civ. Code § 2923.6(g) (emphasis added).

Finally, even if an individual were to qualify for protection under the HBOR despite the qualifications enumerated above, there are very limited remedies under the HBOR. *See* Cal. Civ. Code § 2924.12 (limiting HBOR causes of action to “material” violations/violations causing “actual” damages).

As discussed below, Plaintiff is not entitled to protection under the HBOR and, to the extent he is, his history of bankruptcy and delinquency precludes him from establishing the predicate materiality and damages necessary to state a claim under the HBOR. He simply has not been prejudiced by any suggested violation, if one occurred.

**1. Plaintiff's Claim Against Chase is Subject to Dismissal Because There Was No Improper Processing of a Loan Modification Application, NOD or NOTS Recorded While Chase Was Considering Plaintiff For A Modification**

With respect to Defendant Chase, Plaintiff fails to state a claim because he makes *no* allegations concerning Chase that it violated the HBOR. (*See* Compl., ¶ 23-25.) Quite frankly, he cannot because the newly-enacted HBOR's application is not retroactive to mortgage activities pre-dating January 1, 2013, such as Chase's activities discussed in the Complaint. *See, Rockridge Trust v. Wells Fargo, N.A.*, No. C-13-01457, 2013 WL 5428722, \*29 (N.D. Cal. Sept. 25, 2013) (dismissing without leave to amend HBOR claims directed against an NOD executed before January 2013). Plaintiff concedes that “[o]n or about 2012, Plaintiff was being reviewed for a loan modification with Chase.” (Compl., ¶ 13.)

But Plaintiff further admits that, when he applied for a loan modification with Chase, he was *unemployed*, and Chase did not consider his rental income as “income” for purposes of its loan modification requirements. Chase, not surprisingly, consequently denied Plaintiff's loan



1 modification application by *March 2012*, without any alleged wrongdoing. (Compl., ¶ 13.)  
 2 Moreover, there was no alleged non-complaint NOD or NOTS related to the Property recorded  
 3 under Chase's servicing.

4 Accordingly, Plaintiff's sole allegation of "dual tracking" is particularly meritless as to  
 5 Chase, which did not: service Plaintiff's loan at the time alleged in the Complaint, ever  
 6 improperly process a loan modification application by Plaintiff, or ever record an instrument  
 7 related to Plaintiff's foreclosure that could possibly give rise to a HBOR violation. In sum,  
 8 Plaintiff has not and cannot possibly state a viable claim against Chase and Chase should be  
 9 dismissed from this action.<sup>6</sup>

10 **2. Plaintiff's Claim Against SPS is Subject to Dismissal Because The HBOR**  
 11 **Does Not Apply To Him - He Lacks Standing**

12 **a. Plaintiff Has Failed To Establish That He Provided SPS With**  
 13 **Documentation Supporting A Material Change In His Financial**  
**Circumstances**

14 As discussed above, Section 2923.6(g) states that "[i]n order to minimize the risk of  
 15 borrowers submitting multiple applications for first lien modifications for the purpose of delay,  
 16 the mortgage servicer shall not be obligated to evaluate applications from borrowers who have  
 17 already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan  
 18 modification prior to January 1, 2013 . . . unless there has been a *material* change in the  
 19 borrower's financial circumstances . . . and that change is *documented by the borrower and*  
 20 *submitted to the mortgage servicer.*" Cal. Civ. Code § 2923.6(g) (emphasis added).

21 Here, Plaintiff concedes that Chase properly considered him for a modification in 2012.  
 22 But he fails to plead that he has satisfied the requirements of Section 2923.6(g), a predicate for his  
 23 present claim against SPS.

24 A case illustrating the application of this specific HBOR provision to Plaintiff's case is  
 25 *Winterbower v. Wells Fargo Bank, N.A.*, No. SA CV 13-0360-DOC-MLGx, 2013 WL 1232997

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26 <sup>6</sup> Parenthetically, Plaintiff's counsel has also been provided with documentation proving that Chase was  
 27 not the servicer on his loan at the time of the events alleged in the Complaint that comprise the basis for  
 28 his HBOR claim. Thus, should Plaintiff amend his Complaint as to Chase, he must do so within the  
 requirements of Fed. R. Civ. Proc. R. 11.



(C.D. Cal. Mar. 27, 2013). There, the plaintiffs offered “a *detailed statement* in support of their request for an injunction that they had “a change of circumstance[,] as their income and expenses have changed.” (*Id.* (italics added.)). They claimed that, per the HBOR, the defendants could not “carry out a sale – they are obliged to consider the loan application because there was a material change in the borrower’s financial circumstances and the change was ‘documented and submitted.’” (*Id.*)

The *Winterbower* Court rejected this argument, finding that:

to “document” and “submit” a material change in circumstance means more than simply stating one’s expenses decreased and then providing two numbers. Otherwise, such a barebones description would easily sidestep the entire purpose of subsection (g), *which is meant to relieve mortgage servicers from evaluating multiple loan modification applications submitted for the purpose of delay.*

(*Id.* (citing Cal. Civ. Code § 2923.6(g) (emphasis added).)

Plaintiff has offered *less* than the unsuccessful plaintiff in *Winterbower*. According to Plaintiff, his “changed financial condition” exists only in his mind; he does not allege that he *provided* any documentation concerning changed income or “rental income” to SPS. (Compl., ¶¶ 13-15.) But if the submission of the Plaintiff’s *documents* in *Winterbower* was “barebones,” the allegations in Plaintiff’s Complaint on this issue are non-existent.

Accordingly, Plaintiff cannot state a claim under Section 2923.6.

**b. Plaintiff Is Not Entitled To Protection Under The HBOR**

There is no question that the HBOR is *not intended* to protect individuals like Plaintiff who simply have no means to pay for their mortgage and engage in repeated, bad-faith tactics to delay and avoid foreclosure – whether by insincerely and repeatedly asserting a right to protection under the HBOR or rules applicable to bankruptcy. *See* Cal. Civ. Code § 2920.5(c)(2)(B)-(C). Plaintiff has filed *numerous* bankruptcy petitions for the sole purpose of delaying foreclosure, and Plaintiff has *already* been considered and denied a modification. Against this backdrop, Plaintiff cannot be permitted to sustain this unsupported lawsuit against Defendants.

1           **3. Plaintiff's Claim Against SPS is Subject to Dismissal Because He Cannot**  
 2           **Establish Materiality and Damages**

3           Even assuming the HBOR applied to Plaintiff, Plaintiff cannot establish the predicate  
 4           materiality and damages to state a claim under Section 2923.6. *See* Cal. Civ. Code § 2924.12.  
 5           Plaintiff specifically alleges as follows: “SPS had promptly received all documentation requested  
 6           during the course of its loan modification application process on October 3, 2013. However, SPS  
 7           proceeded to record a Notice of Trustee’s Sale and continue[d] the foreclosure process in  
 8           violation of Cal. Civ. Code § 2923.6.” (Compl., ¶ 23.) There are no other actions that form the  
 9           basis for his Section 2923.6 claim.

10           Section 2920.5(c)(2)(C) states that a “borrower” entitled to protections of the HBOR *shall*  
 11           *not include* “[a]n individual who has filed a case under Chapter 7, 11, 12 or 13 of Title 11 of the  
 12           United States Code and the bankruptcy court has not entered an order closing or dismissing the  
 13           bankruptcy case, or granting relief from a stay of foreclosure.” Here, Plaintiff filed for  
 14           bankruptcy protection on October 23, 2013. (Compl., ¶ 17; *see* 10/23/2013 Bankruptcy Petition,  
 15           RJN, Ex. 14.) The foreclosure sale took place on October 24, 2013. (Compl., ¶ 17.) Thus, at  
 16           least at the time when the foreclosure sale occurred, Plaintiff was not a “borrower” under the  
 17           HBOR and SPS was not required to comply with Section 2923.6.

18           To the extent Plaintiff claims SPS *technically* violated Section 2923.6 by recording the  
 19           NOTS on October 3, 2013, Plaintiff cannot allege that “violation” was material or that it actually  
 20           damaged him. Section 2924f requires only that servicers wait 20 days after posting and recording  
 21           the NOTS before commencing a foreclosure sale.<sup>7</sup> Here, Plaintiff’s October 2013 bankruptcy  
 22           was pending from October 23, 2013 until December 4, 2013 (*See* 10/23/2013 Bankruptcy  
 23           Petition, RJN, Ex. 14; 12/4/13 Order of Dismissal, RJN, Exs. 15-16.) Thus, the HBOR would not  
 24

25           <sup>7</sup> Upon default by the trustor, a “trustee, mortgagee, or beneficiary, or any of their authorized agents” may  
 26           *record a “notice of default”* in the office of the county recorder for each county where the secured real  
 27           property (or any part thereof) is located to commence nonjudicial foreclosure. Cal. Civ. Code §  
 28           2924(a)(1); *Knapp v. Doherty*, 123 Cal. App. 4th 76, 99 (2004). After the notice of default is recorded, the  
 trustee must wait three calendar months before proceeding with the sale. Cal. Civ. Code § 2924(a)(2).  
 After the three-month period has elapsed, a notice of trustee’s sale must be published, posted and mailed  
 20 days before the sale and recorded 14 days before the sale. Cal. Civ. Code § 2924f.

1 have applied to Plaintiff for a period of 43-days, which is more than enough time for SPS to have  
 2 posted and recorded the NOTS, and conducted the Trustee's Sale. Therefore, Plaintiff cannot  
 3 establish that any violation of the HBOR was material, nor can he establish how a mere 20-day  
 4 difference could have actually damaged him, especially when he had filed for bankruptcy three  
 5 times in year leading up to the foreclosure sale.

#### 6 **IV. CONCLUSION**

7 For the reasons stated herein, Defendants respectfully request that this Court sustain their  
 8 Motion to Dismiss, without leave to amend, as the problems with Plaintiff's pleading are  
 9 incurable by any amendment.

10  
 11 DATED: February 24, 2014

Respectfully submitted,

12  
 13 STOEL RIVES LLP

14 /s/ Thomas A. Woods

15 Thomas A. Woods  
 16 Bao M. Vu  
 17 Attorneys for Defendants  
 18 JPMorgan Chase Bank, N.A., and  
 19 Select Portfolio Servicing, Inc.  
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